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BROOKS KUSHMAN P.C. 1000 TOWN CENTER TWENTY-SECOND FLOOR SOUTHFIELD MI 48075

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JUN 2 2 2005

OFFICE OF PETITIONS

In re Application of

Thomas Eyhorn

Application No. 10/775,463

Filed: February 10, 2004

Attorney Docket No. WAS 0618 PUS

ON PETITION

This is a decision on the petition under 37 CFR 1.137(b), filed May 4, 2005, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.137(b)." This is not a final agency decision.

On June 28, 2004, petitioner expressly abandoned the above-identified application pursuant to 37 CFR 1.138. On July 20, 2004, the Office mailed a Notice of Abandonment, stating that the application was abandoned in view of the letter of express abandonment signed by an attorney of record. On December 20, 2004, petitioner filed a petition under 37 CFR 1.137(b). In a letter dated April 22, 2005, the Office stated that the petition was not treated on the merits because the petition fee was insufficient. On May 4, 2005, petitioner filed the present petition and the amount due for the petition fee.

The provisions of 37 CFR 1.137(b) provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

(1) The reply required to the outstanding Office action or notice, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to

prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must include payment of the issue fee or any outstanding balance. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

- (2) The petition fee as set forth in 37 CFR 1.17(m);
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and
- (4) Any terminal disclaimer (and fee set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

The present petition does not satisfy requirement (3) above.

In the present petition, petitioner asserts that the above-identified application became abandoned unintentionally by petitioner's attorney's mistaken filing of an Express Abandonment under 37 CFR 1.138 on June 28, 2004.

The Office notes: "A delay resulting from a deliberately chosen course of action on the part of the applicant is not an 'unintentional' delay within the meaning of 37 CFR 1.137(b)." MPEP 711.03(c). Moreover, "[] a change in circumstances that occurred subsequent to the abandonment of an application does not render 'unintentional' the delay resulting from a previous deliberate decision to permit an application to be abandoned." <u>Id</u>.

Here, the only explanation petitioner has supplied in the petition is that the above-identified application became abandoned unintentionally by petitioner's attorney's mistaken filing of an Express Abandonment under 37 CFR 1.138. Petitioner has not explained how this mistake occurred or the circumstances surrounding the event. Therefore, petitioner has not made a sufficient showing that the delay was unintentional.

In any renewed petition, petitioner should include a thorough explanation as to why petitioner's attorney's mistake in filing an Express Abandonment under 37 CFR 1.138 can reasonably be considered unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Application No. 10/775,463

By FAX:

(703) 872-9306

Attn: Office of Petitions

By hand:

Customer Service Window

Mail Stop Petition Randolph Building 401 Dulany Street Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3211.

Christina Partere Donnell

Christina Tartera Donnell Senior Petitions Attorney Office of Petitions